

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)	File No. EB-05-TC-040
)	
SMC, LLC)	NAL/Acct. No. 200832170009
)	
)	FRN: 0017313230

FORFEITURE ORDER

Adopted: September 16, 2010**Released: September 28, 2010**

By the Commission:

I. INTRODUCTION

1. In this *Forfeiture Order* (“Order”), we issue a monetary forfeiture in the amount of \$806,500 against SMC, LLC (“SMC”) for willful and repeated violations of section 227 of the Communications Act of 1934, as amended (“Act”)¹ and the Commission’s related rules and orders,² by delivering at least 145 unsolicited advertisements to the telephone facsimile machines of at least 84 consumers.

II. BACKGROUND

2. This Forfeiture Order arises from two distinct Notices of Apparent Liability that the Commission issued against SMC. The facts and circumstances surrounding these cases are set forth in the Commission’s Notices of Apparent Liability for Forfeiture³ and need not be reiterated at length.

3. Section 227(b)(1)(C) of the Act makes it “unlawful for any person within the United States, or any person outside the United States if the recipient is within the United States . . . to use any telephone facsimile machine, computer, or other device to send, to a telephone facsimile machine, an unsolicited advertisement.”⁴ The term “unsolicited advertisement” is defined in the Act and the Commission’s rules as “any material advertising the commercial availability or quality of any property,

¹ 47 U.S.C. § 227.

² See also 47 U.S.C. § 503(b)(1). The Commission has the authority under this section of the Act to assess a forfeiture against any person who has “willfully or repeatedly failed to comply with any of the provisions of this Act or of any rule, regulation, or order issued by the Commission under this Act . . .”; see also 47 U.S.C. § 503(b)(5) (stating that the Commission has the authority under this section of the Act to assess a forfeiture penalty against any person who does not hold a license, permit, certificate or other authorization issued by the Commission or an applicant for any of those listed instrumentalities so long as such person (A) is first issued a citation of the violation charged; (B) is given a reasonable opportunity for a personal interview with an official of the Commission, at the field office of the Commission nearest to the person’s place of residence; and (C) subsequently engages in conduct of the type described in the citation).

³ *SMC, LLC*, Notice of Apparent Liability for Forfeiture, 23 FCC Rcd 3497 (2008); *SMC, LLC*, Notice of Apparent Liability for Forfeiture, 23 FCC Rcd 11681 (2008) (collectively “*NALs*”).

⁴ 47 U.S.C. § 227(b)(1)(C); 47 C.F.R. § 64.1200(a)(3).

goods, or services which is transmitted to any person without that person's prior express invitation or permission in writing or otherwise.”⁵ There is, however, an exception to the Commission's rule that permits a party to deliver unsolicited advertisements to persons with whom it has an established business relationship⁶ if certain conditions are met (*i.e.*, the sender obtained the number of the facsimile machine either (i) through a voluntary communication by the recipient directly to the sender within the context of the established business relationship, or (ii) through a directory, advertisement, or site on the Internet to which the recipient voluntarily agreed to make available its facsimile number for public distribution).⁷

4. On October 12, 2005, in response to one or more consumer complaints alleging that SMC had faxed unsolicited advertisements, the Enforcement Bureau (“Bureau”) issued a citation⁸ to SMC, pursuant to section 503(b)(5) of the Act.⁹ The Bureau cited SMC for using a telephone facsimile machine, computer, or other device, to send unsolicited advertisements for medical services offered by another entity, in violation of section 227 of the Act and the Commission's related rules and orders. The citation warned SMC that subsequent violations could result in the imposition of monetary forfeitures of up to \$11,000 per violation, and included a copy of the consumer complaints that formed the basis of the citation.¹⁰ The citation informed SMC that within thirty (30) days of the date of the citation, it could either request an interview with Commission staff, or provide a written statement responding to the citation. SMC did not request an interview or otherwise respond to the citation.

5. Following the issuance of the citation, the Commission received at least 84 complaints from consumers alleging that SMC faxed at least 145 unsolicited advertisements to them. These violations, which occurred after the Bureau's citation, resulted in the issuance of two Notices of Apparent Liability for Forfeiture against SMC: one on February 29, 2008, in the amount of \$458,500, and one on July 24, 2008, in the amount of \$348,000.¹¹ The *NALs* ordered SMC to either pay the proposed forfeiture amount within thirty (30) days or submit evidence or arguments in response to the *NAL* to show that no forfeiture should be imposed or that some lesser amount should be assessed. SMC did not respond to the *NALs* or pay the proposed forfeiture amounts.

III. DISCUSSION

6. Section 503(b) of the Act authorizes the Commission to assess a forfeiture for each violation of the Act or of any rule, regulation, or order issued by the Commission under the Act by a non-common carrier or other entity not specifically designated in section 503 of the Act. The maximum penalty for such a violation is \$11,000 for a violation occurring before September 2, 2008, and \$16,000

⁵ See 47 U.S.C. § 227(a)(4); 47 C.F.R. § 64.1200(f)(13).

⁶ An “established business relationship” is defined as a prior or existing relationship formed by a voluntary two-way communication “with or without an exchange of consideration, on the basis of an inquiry, application, purchase or transaction by the business or residential subscriber regarding products or services offered by such person or entity, which relationship has not been previously terminated by either party.” See 47 U.S.C. § 227(a)(2); see also 47 C.F.R. § 64.1200(f)(5).

⁷ See 47 U.S.C. § 227(b)(1)(C); 47 C.F.R. § 64.1200(a)(3)(i), (ii).

⁸ Citation from Kurt A. Schroeder, Deputy Chief, Telecommunications Consumers Division, Enforcement Bureau, File No. EB-05-TC-040 issued to SMC on October 12, 2005.

⁹ See 47 U.S.C. § 503(b)(5) (authorizing the Commission to issue citations to persons who do not hold a license, permit, certificate or other authorization issued by the Commission or an applicant for any of those listed instrumentalities for violations of the Act or of the Commission's rules and orders).

¹⁰ Bureau staff mailed the citation to the following address: 13612 Midway Road, Suite 405, Dallas, TX 75244-3410.

¹¹ See n.3, *supra*; see also 47 U.S.C. § 503(b)(1).

for a violation occurring on or after September 2, 2008.¹² In exercising such authority, we are to take into account “the nature, circumstances, extent, and gravity of the violation and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require.”¹³

7. Although the *Commission’s Forfeiture Policy Statement* does not establish a base forfeiture amount for violating the prohibition against using a telephone facsimile machine to send unsolicited advertisements, the Commission has previously considered \$4,500 per unsolicited fax advertisement to be an appropriate base amount.¹⁴ In the NALs, we applied that base amount to each of 117 of the apparent violations. In addition, where the consumer requests the company to stop sending facsimile messages, and the company continues to send them, the Commission has previously considered \$10,000 per unsolicited fax advertisement as the appropriate forfeiture for such egregious violations.¹⁵ Here, 18 consumers specifically requested that SMC cease sending facsimiles. Notwithstanding these requests, an additional 28 facsimiles were sent to these consumers. Thus, we apply the \$10,000 amount to each of 28 of the apparent violations.

8. SMC did not respond to the NALs or pay the proposed forfeiture amounts. SMC has failed to identify facts or circumstances to persuade us that there is a basis for modifying the proposed forfeitures and we are not aware of any mitigating circumstances that would warrant a reduction of the forfeiture penalties. For these reasons, and based on the information before us, we hereby impose a total forfeiture of \$806,500 for SMC’s willful or repeated violation of section 227 of the Act and the Commission’s related rules and orders, as set forth in the NALs.

IV. ORDERING CLAUSES

9. Accordingly, IT IS ORDERED, pursuant to section 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. § 503(b), and section 1.80(f)(4) of the Commission’s rules, 47 C.F.R. § 1.80(f)(4), that SMC, LLC IS LIABLE FOR A MONETARY FORFEITURE to the United States

¹² Section 503(b)(2)(C) provides for forfeitures of up to \$10,000 for each violation in cases not covered by subparagraph (A) or (B), which address forfeitures for violations by licensees and common carriers, among others. See 47 U.S.C. § 503(b). In accordance with the inflation adjustment requirements contained in the Debt Collection Improvement Act of 1996, Pub. L. 104-134, Sec. 31001, 110 Stat. 1321, the Commission implemented an increase of the maximum statutory forfeiture under section 503(b)(2)(C) first to \$11,000 and more recently to \$16,000. See 47 C.F.R. § 1.80(b)(3); *Amendment of Section 1.80 of the Commission’s Rules and Adjustment of Forfeiture Maxima to Reflect Inflation*, 15 FCC Rcd 18221 (2000) (forfeiture maximum for this type of violator set at \$11,000); *Amendment of Section 1.80(b) of the Commission’s Rules and Adjustment of Forfeiture Maxima to Reflect Inflation*, 19 FCC Rcd 10945 (2004) (amendment of section 1.80(b) to reflect inflation left the forfeiture maximum for this type of violator at \$11,000); *Amendment of Section 1.80(b) of the Commission’s Rules, Adjustment of Forfeiture Maxima to Reflect Inflation*, 23 FCC Rcd 9845 (2008) (amendment of section 1.80(b) to reflect inflation increased the forfeiture maximum for this type of violator to \$16,000).

¹³ See 47 U.S.C. § 503(b)(2)(D); see also *The Commission’s Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines, Report and Order*, 12 FCC Rcd 17087, 17100-01 para. 27 (1997) (*Forfeiture Policy Statement*), *recon. denied*, 15 FCC Rcd 303 (1999).

¹⁴ See *Get-Aways, Inc.*, Notice of Apparent Liability For Forfeiture, 15 FCC Rcd 1805 (1999); *Get-Aways, Inc.*, Forfeiture Order, 15 FCC Rcd 4843 (2000); see also *US Notary, Inc.*, Notice of Apparent Liability for Forfeiture, 15 Rcd 16999 (2000); *US Notary, Inc.*, Forfeiture Order, 16 FCC Rcd 18398 (2001); *Tri-Star Marketing, Inc.*, Notice of Apparent Liability For Forfeiture, 15 FCC Rcd 11295 (2000); *Tri-Star Marketing, Inc.*, Forfeiture Order, 15 FCC Rcd 23198 (2000).

¹⁵ See *Carolina Liquidators, Inc.*, Notice of Apparent Liability for Forfeiture, 15 FCC 16837, 16842 (2000); *21st Century Fax(es) Ltd., AKA 20th Century Fax(es)*, Notice of Apparent Liability for Forfeiture, 15 FCC Rcd 24406, 24411 (2000).

Government in the sum of \$806,500 for willfully and repeatedly violating section 227(b)(1)(c) of the Communications Act, 47 U.S.C. § 227(b)(1)(c), section 64.1200(a)(3) of the Commission's rules, 47 C.F.R. § 64.1200(a)(3), and the related orders as described in the paragraphs above.

10. Payment of the forfeiture shall be made in the manner provided for in section 1.80 of the Commission's rules within thirty (30) days of the release of this Order. If the forfeiture is not paid within the period specified, the case may be referred to the Department of Justice for collection pursuant to section 504(a) of the Act.¹⁶ Payment of the forfeiture must be made by check or similar instrument, payable to the order of the Federal Communications Commission. The payment must include the NAL/Account Number and FRN Number referenced above. Payment by check or money order may be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000. Payment by overnight mail may be sent to U.S. Bank – Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101. Payment by wire transfer may be made to ABA Number 021030004, receiving bank TREAS/NYC, and account number 27000001. For payment by credit card, an FCC Form 159 (Remittance Advice) must be submitted. When completing the FCC Form 159, enter the NAL/Account number in block number 23A (call sign/other ID), and enter the letters "FORF" in block number 24A (payment type code). SMC, LLC will also send electronic notification on the date said payment is made to Johnny.Drake@fcc.gov. Requests for full payment under an installment plan should be sent to: Chief Financial Officer -- Financial Operations, 445 12th Street, S.W., Room 1-A625, Washington, D.C. 20554. Please contact the Financial Operations Group Help Desk at 1-877-480-3201 or Email: ARINQUIRIES@fcc.gov with any questions regarding payment procedures.

11. IT IS FURTHER ORDERED that a copy of the Forfeiture Order shall be sent by First Class mail and certified mail return receipt requested to SMC, LLC, Attention: Greg Horne, 6404 Village Drive, Plano, TX 75024, 13612 Midway Road, #405, Farmers Branch, TX 75244, 6009 W. Parker Road, Suite 149-114, Plano, TX 75093, and 16901 Dallas Parkway, Addison, TX 75001.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

¹⁶ 47 U.S.C. § 504(a).